unaccompanied minor or suffered from a mental impairment) during the one-year period after arrival; (3) ineffective assistance of counsel;[10] (4) the applicant maintained Temporary Protected Status, lawful immigrant or non-immigrant status, or was given parole, until a reasonable period before the filing of the application; (5) the applicant filed an asylum application before the one-year deadline, but that application was rejected as not properly filed, was returned to applicant for corrections, and was re-filed within a reasonable period thereafter; or (6) the death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family. 8 C.F.R. § 1208.4(a)(5). The burden of proof is on the applicant to establish to the satisfaction of the court that the circumstances were not intentionally created by him or her through his or her own action or inaction, that those circumstances were directly related to his or her failure to file the application within the one-year period, and that the delay was reasonable under the circumstances. 8 C.F.R. § 1208.4(a)(5); *see also Matter of Y-C-*, 23 I&N Dec. 286, 287-88 (BIA 2002) (finding that extraordinary circumstances existed where a minor was in immigration custody for more than one year after his arrival to the United States and sought to file an application five and a half months subsequent to his release). An immigration judge should not employ a "benefit of the doubt" standard in determining whether an applicant qualifies for an exception to the one-year statutory filing deadline. *Sukwanputra v. Gonzales*, 434 F.3d 627, 634-35 (3d Cir. 2006).

In *Matter of D-G-C-*, the BIA held the "mere continuation of an activity in the United States that is substantially similar to the activity from which an initial claim of past persecution is alleged and that does not significantly increase the risk of future harm is insufficient to establish 'changed circumstance' to excuse an untimely application within the meaning of section 208(a)(2)(D) of the Act." *See Matter of D-G-C-*, 28 I&N Dec. 297, 302 (BIA 2021). In order to qualify for the changed circumstances exception, an applicant's circumstance must be different in significant way – qualitatively different – thus significantly affecting the applicant's eligibility for asylum as a consequence of newly established facts or a new legal basis for relief. *Id.* at 300.

2. Particularly Serious Crime

An applicant is statutorily barred from asylum if he or she, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community." INA § 208(b)(2)(A)(ii); 8 C.F.R. § 1208.13(c)(1). An applicant who is subject to a deferred adjudication that satisfies the elements of a "conviction" under section 101(a)(48)(A) of the Act has been "convicted by a final judgment" within the meaning of the particularly serious crime bar. *Matter of D-L-S-*, 28 I&N Dec. 568, 575 (BIA 2022). The Immigration Judge need not separately determine whether the applicant is a danger to the community because a person who has been convicted of a particularly serious crime shall be considered a danger to the community. *See* INA § 208(b)(2)(A)(ii); *see also Matter of N-A-M-*, 24 I&N Dec. 336, 342

[10] 8 C.F.R. § 1208.4(a)(5)(iii) sets out in detail the procedural requirements for an ineffective assistance of counsel claim with regard to the extraordinary circumstances exception to the one-year bar. Additionally, an applicant claiming ineffective assistance of counsel must show that prior counsel's deficient performance prevented them from reasonably presenting their case and caused them substantial prejudice. *Contreras v. Att'y Gen.*, 665 F.3d 578, 584 (3d Cir. 2012); *see also Mahmood v. Gonzales*, 427 F.3d 248, 251, n. 7 (3d Cir. 2005) (recognizing that fraudulent conduct or ineffective assistance of counsel can serve as a basis for equitable tolling, i.e., can prevent the alien from filing in a timely manner such that equity warrants tolling the limitations period).

(BIA 2007) (holding said proposition in the context of a withholding of removal analysis); *Matter of Q-T-M-T-*, 21 I&N Dec. 639, 655-56 (BIA 1996) (holding said proposition in the context of a withholding of deportation analysis).

In the context of asylum, all aggravated felonies are *per se* particularly serious crimes. INA § 208(b)(2)(B)(i).[11] Additionally, an offense need not be an aggravated felony to constitute a particularly serious crime for either asylum or withholding of removal. *Bastardo-Vale v. Att'y Gen.*, 934 F3d. 255, 264–65 (3d Cir. 2019) (overruling *Alaka v. Attorney General*, 456 F.3d 88 (3d Cir. 2006), and holding that the phrase "particularly serious crime," as used in both the asylum and the withholding of removal statutes, includes, but is not limited to, aggravated felonies). When making a particularly serious crime determination for a crime that is not *per se* particularly serious, the Court must use the two-step analysis as set forth in *N-A-M-*. *Luziga v. Att'y Gen.*, 937 F.3d 244, 253 (3d Cir. 2019). Specifically, the Court should (1) consider whether the elements of an offense "potentially bring the crime into a category of particularly serious crimes," and then (2) once the elements indicate that the crime is a particularly serious crime, all reliable information may be considered in making a determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction. *Luziga*, 937 F.3d at 253. *See also Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007) ("The proper focus for determining whether a crime is particularly serious is on the nature of the crime and not the likelihood of future serious misconduct;"[12] *see also Matter of R-A-M-*, 25 I&N Dec. 657, 661-62 (BIA 2012) (finding possession of child pornography under Cal Penal Code § 311.11(a) is not *per se* a particularly serious crime but downloading "numerous images and videos" of it was enough to make it so); *Kaplun v. Att'y Gen.*, 602 F.3d 260, 267-68 (3d Cir. 2010) (finding that securities fraud with losses of nearly $900,000 was a particularly serious crime); *Denis v. Att'y Gen.*, 633 F.3d 201, 213-17 (3d Cir. 2011) (finding that where petitioner tampered with physical evidence by violently dismembering and concealing his victim constituted an aggravated felony and a particularly serious crime); *Sunuwar v. Att'y Gen.*, 989 F.3d 239 (3d Cir. 2021) (finding that the petitioner's strangulation conviction constituted a particularly serious crime based on the offense elements, sentence imposed, and the petitioner's violent conduct, which included choking the victim with his hands, a cell phone, and a shirt).

A non-aggravated felony can constitute a particularly serious crime even if the sentence imposed is relatively minor because the sentence imposed is not a dominant factor in the analysis. *See Nkomo v. Att'y Gen.*, 930 F.3d 129, 135 (3d Cir. 2019) (upholding a particularly-serious-crime determination where a noncitizen received a non-custodial sentence of time served); *see also Sunuwar v. Att'y Gen.*, 989 F.3d 239, 249 (3d Cir. 2021) (upholding a particularly serious crime determination with a sentence of less than two years for an offense that could carry a maximum of twenty years)

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[11] INA § 208(b)(2)(B)(i) provides that "[f]or purposes of [determining eligibility for asylum], an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." INA § 208(b)(2)(B)(i). Additionally, INA § 208(b)(2)(B)(ii) states that "[t]he Attorney General may designate by regulation offenses that will be considered" particularly serious crimes.

[12] The BIA has determined that once it finds that the crime by its nature brings it within the "range" of particularly serious, either party may bring in any otherwise reliable evidence to determine whether it should be treated as such. *N-A-M-*, 24 I&N Dec. at 342 (BIA would not limit its inquiry to the record of conviction or sentencing information and considered the Statement in Support of Warrantless Arrest).

In limited circumstances, the court may look at information outside the record of conviction when analyzing whether an offense falls within the ambit of particularly serious crimes. Specifically:

> [i]f the elements of the offense do not potentially bring the crime into a category of particularly serious crimes, the individual facts and circumstances of the offense are of no consequence, and the alien would not be barred from a grant of withholding of removal. On the other hand, once the elements of the offense are examined and found to potentially bring the offense within the ambit of a particularly serious crime, all reliable information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction.

Denis v. Att'y Gen., 633 F.3d 201, 215 (3d Cir. 2011) (quoting *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007)); *see also Luziga*, 937 F.3d at 253 (all reliable information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction).

A respondent's mental health may be considered in determining whether a respondent was convicted of a particularly serious crime for immigration purposes. (*Matter of B-Z-R,* 28 I&N Dec. 563 (A.G. 2022)) (overruling *Matter of G-G-S-*, I&N Dec. 339 (BIA 2014)).

3. Serious Non-Political Crime

An applicant is statutorily ineligible for asylum if there are reasonable grounds to believe that he or she committed a serious nonpolitical crime outside of the United States prior to his or her arrival in the United States. INA § 208(b)(2)(A)(iii).[13] In *Matter of E-A-*, the BIA provided a three-part test to assess the political nature of the crime: (1) the act or acts were directed at a governmental entity or political organization, as opposed to a private or civilian entity; (2) they were directed toward modification of the political organization of the state; and (3) there is a close and direct causal link between the crime and its political purpose. 26 I&N Dec. 1, 3 (BIA 2012). Once the crime is determined to be political, if it is not "atrocious" in nature, "an IJ should balance the seriousness of the criminal acts against the political aspect of the conduct to determine whether the criminal nature of the acts outweighs their political character." *Matter of E-A-*, 26 I&N Dec. 1, 3 (BIA 2012).

Determining whether an offense is "nonpolitical" involves consideration of whether "the political aspect of the offense outweigh[s] its common-law character." *See Matter of E-A-*, 26 I&N Dec. 1, 3 (BIA 2012) (holding that an applicant who burned passenger buses and cars, threw stones, and disrupted economic activity while pretending to be from the opposition party reached the level of serious criminal conduct that, when weighed against its political nature, constituted a serious nonpolitical crime). "This would not be the case if the crime is grossly out

[13] Note that the aggravated felony bar was not explicitly made applicable to this section by statute.